IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Badar Hussain & ors. vs. Gulam Hussain & anr.

S.B. Civil Second Appeal No.90/1986 against the judgment and decree dated 22.1.1986 passed by the Civil Judge & Chief Judicial Magistrate, Banswara in Civil Appeal No.7/1983.

Date of Judgment: March 27, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Mohd. Aslam for the appellants.
None appeared for the respondents.

BY THE COURT:

This appeal was admitted after framing two substantial questions of law on 26.8.1986.The appeal was heard and the record also perused. It transpires from the record that during the pendency of the suit, the plaintiff Ajattun died leaving behind eight legal representatives, five sons and three daughters. Immediately after the death of sole plaintiff Ajattun, an application was submitted stating therein that those eight legal representatives named in the application be taken on record as plaintiffs. It is also mentioned that the application has been filed within 30 days from the death of the plaintiff. The application was submitted on 12.2.1979. This fact was noticed by the first appellate court and the first appellate court observed on this application that no notice was

issued to any of the legal representatives of the plaintiff. The first appellant court found this fact as serious irregularity instead of illegality and observed that the case was fit for remand so that the proposed legal representatives could have been served with the notice and, thereafter, the application for taking on record the legal representatives of sole plaintiff could have been decided but the first appellate court merely on the ground that it will cause delay, refused to remand the matter to the trial court.

The legal representatives of the plaintiff shown by Karamat Hussain son of plaintiff Ajattun in the application dated 12.2.1979, has not disclosed that who should be impleaded as plaintiff and who should be impleaded as defendant. The application is not signed by all the heirs nor *Vakalatnama* has been filed with the said application or even thereafter. Be it as it may be, the crucial fact was that the defendant Gulam Hussain himself is son of said one of the proposed legal representative of the plaintiff. Not only this but the defendant's case in written statement is that the house in dispute was purchased by the said legal representative, defendant's father Musarraf Hussain, therefore, the defendant is residing in the house. Despite this stand taken by the defendant, the defendant's father was not served with notice before impleading him as party in the suit as plaintiff. It will be worthwhile to mention here that even all other legal representatives of the sole

deceased plaintiff, preferred appeal but by impleading Musarraf Hussain as as respondent and not as appellant with them. Therefore, before the first appellate court, it was clear that the interest of the appellants was not same with said Musarraf Hussain, legal representative of the original plaintiff. In the first appeal, the power was filed by said Musarraf Hussain, with defendant Gulam Hussain but it appears that since the suit was dismissed by the trial court, therefore, this fact might have escaped the notice of the first appellate court and none of the parties also brought this fact in the knowledge of the first appellate court.

Since in above circumstances, said Musarraf Hussain was impleaded as plaintiff but in fact he was not party before the trial court. Further, since the said Musarraf Hussain was wrongly impleaded as plaintiff, he could not have been served by summon of the court. Therefore, on this count alone, the suit should have been remanded by the first appellate court and, therefore, core question involved in this appeal is whether the first appellate court committed serious error of law by not remanding the matter to the trial court only on the ground of likely delay in disposal of the suit.

The facts in brief may be recapitulated again. Sole plaintiff filed the suit for eviction of the sole defendant Gulam Hussain on the ground that sole plaintiff Ajattun was in permissive possession and he gave written understanding that he will vacate the suit premises and deliver

the possession of the suit house to the plaintiff but he did not deliver the possession. The defendant's stand was that the suit house was subject matter of another suit no.125/1947 wherein the house was attached and thereafter, the plaintiff's father (Musarraf Hussain) paid the consideration for the house in dispute to decree holder Albeli Lal on 9.1.1954 and purchased the house. Therefore, the plaintiff is residing in the house after taking it from his father Musarraf Hussain. After the death of sole plaintiff, application was submitted for impleading the sons and daughters of sole plaintiff Ajattun for taking them on record. The trial court did not issue notice to the legal representatives of the plaintiff's said son Musarraf Hussain through whom the defendant claimed the house. The trial court did not pass any order on that application submitted for taking on record the legal representatives of plaintiff. The said Musarraf Hussain son of the plaintiff as well father of the sole defendant , in such circumstances, could not have been impleaded as plaintiff without his consent. Not only this, no power has been filed on behalf of said Musarraf Hussain in the trial court nor he appeared. The reason was that no summon was served upon said Musarraf Hussain. It is not clear from the entire record, that it is not clear when and how the names of plaintiff's all sons(including the father of the defendant) was added in the cause title of the suit as plaintiff.

The first appellate court committed serious error of law by

ignoring the fact that the other legal representatives of plaintiff Ajattun themselves impleaded the defendant's father Musarraf Hussain as respondent in the first appeal and *Vakatatnama* has been filed by Musarraf Hussain along with the defendant-appellant Gulam Hussain. This fact should have prompted the first appellate court to set aside the judgment and decree of the trial court on this sole ground to give opportunity of hearing to the legal representatives of the plaintiff by the trial court before impleading them as legal representatives and further to contest the suit after taking on record the legal representatives as party at appropriate place.

In view of the above, the two questions framed by this Court on 26.8.1986 need no decision and the suit is required to be remanded back to the trial court though it is very old one but merely on the ground that the litigation is old one, in the peculiar circumstances of this case, the remand cannot be avoided.

Therefore, the appeal of the appellants is partly allowed and the judgment and decree passed by the two courts below dated 17.8.1982 and 22.1.1986 are set aside, and the trial court is directed to decide the application dated 12.2.1979 afresh filed by the plaintiff after giving opportunity of hearing to Musarraf Hussain and he may be impleaded as defendant only and thereafter to decide the suit afresh. Since the matter is very old one, therefore, the trial court will take the matter as

far as possible on day to day basis with special care for service of the respondents to avoid delays. No order as to costs. The appellants are directed to appear before the trial court on 20.4.2006.

(**PRAKASH TATIA),J.**

mlt.